



March 20, 2019

Via Electronic Mail

Council of the City of Fresno
2600 Fresno St.
Fresno, CA 93721

Re: Safe Transfer of Objects to Pedestrians Ordinance

Dear Members of the City Council:

I am writing on behalf of the American Civil Liberties Union of Northern California ("ACLU") to express concerns about the City of Fresno's proposed Ordinance, "Safe Transfer of Objects to Pedestrians," which is scheduled to come before the Council for a vote tomorrow, March 21, 2019.

The Ordinance notes that "[a] person commits the offense of unlawful transfer on vehicular right-of-way if a...driver or passenger in a vehicle, gives....any item of property to a pedestrian" or if a "pedestrian, accepts, receives or retains....any item of property from a driver or passenger." As of today, there is no accompanying staff report for the ordinance or a preamble indicating the purpose or necessity of the ordinance.¹

I appreciate the importance of protecting pedestrians and drivers, assuming that is the purpose of the proposed ordinance, but the government may not pursue worthy ends through unconstitutional means. The Ordinance presents significant First Amendment concerns, because it singles out expressive conduct based on its content. "Non-verbal conduct implicates the First Amendment when it is intended to convey a 'particularized message' and the likelihood is great that the message would be so understood." *Nunez v. Davis*, 169 F.3d 1222, 1226 (9th Cir. 1999) (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989)). See also *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1241 (11th Cir. 2018) ("It should be no surprise, then, that the circumstances surrounding an event often help set the dividing line between activity that is sufficiently expressive and similar activity that is not. Context separates the physical activity of walking from the expressive conduct associated with a picket line or a parade").

¹ The Councilmembers presenting this Ordinance have offered no evidence to justify adopting an ordinance that prohibits transferring or giving of property in such a sweeping manner. "Because the burden rests on the City to submit evidence in support of its position, we cannot simply assume that the City's other streets, alleys, and sidewalks allegedly suffer from similar solicitation-related traffic problems. By applying the Ordinance citywide to all streets, alleys, and sidewalks, the City has burdened substantially more solicitation speech than is reasonably necessary to achieve its purpose." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach* 657 F.3d 936, 949 (9th Cir. 2011).



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By prohibiting the “transfer” or “giving” of property to a pedestrian, the City is regulating an activity that is likely protected under the First Amendment. For example, under the Ordinance, a driver handing out a political leaflet or flyer would be subject to a fine of \$75 for the first offense, \$150 for the second offense within six months, and \$300 for each subsequent offense within six months. Similarly, a driver giving money to someone at an intersection, such as a charitable donation for a funeral fundraiser without a permit, would also be subject to the fine. In this way, the Ordinance “is related to the suppression of free expression” in the form of charitable giving and therefore subject to “the most exacting scrutiny.” *Texas v. Johnson*, 491 U.S. 397, 403, 412 (1989). Strict scrutiny applies regardless of the City’s motives. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227-28 (2015). Under strict scrutiny, the Ordinance is unconstitutional unless it “furthers a compelling interest and is narrowly tailored to achieve that interest.” *Id.* at 2231; *see also Boos v. Barry*, 485 U.S. 312, 321 (1988) (content-based restriction on speech in public forum is unconstitutional unless “necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end”).

The complete ban of transferring or giving of property is likely not narrowly tailored to achieve any possible compelling interest, for at least four reasons. First, the City could simply enforce existing California Vehicle laws prohibiting pedestrians from stepping into the roadway. Cal. Veh. Code § 21954 (“Every pedestrian upon a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway so near as to constitute an immediate hazard”). Moreover, the California Vehicle Code already prohibits stopping a car “so as to create a hazard to other traffic upon the highway.” *Id.* § 22651. “Because the Vehicle Code addresses the same subject...as the City’s ordinance at issue, and the state Legislature has in no other statute provided for local regulation in this area, the City’s ordinance is preempted by state law.” *O’Connell v. City of Stockton*, 41 Cal.4th 1061, 1075 (2007).

Second, to the extent the City is concerned with safety conditions at certain intersections, the Ordinance is “geographically overinclusive.” *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949 (9th Cir. 2011) (finding that an ordinance was not narrowly tailored because it applied citywide to all streets and sidewalks, yet the City was concerned only with respect to a small number of major streets and medians). The impact of this overinclusive Ordinance is significant because the City has several less restrictive means of achieving its goal, if that goal is indeed about improving safety conditions. For example, the City could narrowly tailor the Ordinance to those specific intersections or types of roads that are especially dangerous.

Third, there are “obvious examples” of prohibited speech that would not cause the types of problems that may be motivating the City. *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166 (2002). For example, for the past 32 years, the City has participated in “Kids Day”—a longtime tradition that involves volunteers standing at



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intersections selling newspapers.² The Fresno Firefighters also participate in the annual “Fill the Boot” campaign to raise money for kids and adults with muscular dystrophy and other muscle debilitating diseases.³ These events have been sanctioned by the City despite involving drivers and passengers in vehicles handing “property” to the Kids Day volunteers or firefighters.

Fourth, the City already allows people to stand in the medians so long they obtain a permit under § 14-2502 of the Municipal Code. The City must not be truly concerned about the safety of pedestrians and drivers because it allows such “transfers” and “giving” on a median island when there is a permit issued. For this reason and the those articulated above, “[t]he Ordinance is not narrowly tailored” because “there are a number of feasible, readily identifiable, and less-restrictive means of addressing the City’s concerns.” *Comite de Jornaleros de Redondo Beach*, 657 F.3d. at 950.

I look forward to the City’s response and hope that the Council rejects the adoption of the Ordinance. If you have any questions or concerns, please do not hesitate to call me at (559) 554-2994.

Sincerely,

A handwritten signature in purple ink that reads "Angélica Salceda". The signature is fluid and cursive, with the first name and last name clearly legible.

Angélica Salceda
Staff Attorney
ACLU of Northern California

² See Valley Children’s Healthcare Kids Day, available at <https://www.valleychildrens.org/foundation/how-you-can-help/kids-day>

³ See “Fresno, Clovis firefighters ‘Fill the Boot’ for muscular dystrophy,” Fresno Bee (October 17, 2016), available at <https://www.fresnobee.com/news/local/article108878597.html>